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Chairman: Mrs. FLORES (Uruguay)

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The meeting was called to order at 3.25 p.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/303 and A/48/170-S/25801)

1. Miss BOUM (Cameroon), referring to the draft statute for an international criminal tribunal contained in the annex to the report of the International Law Commission (A/48/10), said that for the proper administration of justice, her delegation would have preferred to have a code of crimes against the peace and security of mankind which defined clearly the serious crimes that the tribunal would be mandated to punish. Such a code would constitute the substantive law on which the procedural law, the draft statute of the tribunal in the current case, was based. The Commission's draft statute constituted both substantive and procedural law in the sense that it contained provisions defining crimes and the applicable law and provisions relating to the establishment and organization of the tribunal.

2. That approach was in violation of the principle nullum crimen sine lege, according to which substantive law had to precede procedural law. Draft article 22 did, of course, list a number of international instruments which might constitute substantive law. However, apart from the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, which envisaged the possibility of such crimes being brought before an international tribunal, the remaining conventions were based on the principle of universal jurisdiction. Moreover, as the statute stood, certain serious crimes against the peace and security of mankind might be beyond the tribunal's jurisdiction, either because they were not defined in a convention (aggression) or because they were defined in a convention which had not yet entered into force (mercenary activities).

3. She regretted that the Commission was proposing an ad hoc mechanism the use of which might be selective and might, in any case, work against the interests of the smaller countries.

4. In her delegation's view, the tribunal should be established by the conclusion of a special treaty, thereby enabling the tribunal to be associated with the United Nations as provided for under Articles 57 and 63 of the Charter.

5. In reference to the establishment and composition of the tribunal, and in particular the criteria for electing judges, the criterion of equitable geographical representation should be added to article 7, paragraph 5; in that way certain regions could not be overrepresented.

6. In respect of jurisdiction and applicable law, and in particular the procedure under which the tribunal's jurisdiction could be accepted, her delegation preferred the "opting in" system described in Alternative A of draft article 23.

7. In terms of procedure and in particular the rights of the accused, her delegation endorsed the prohibition against trials in absentia set forth in article 44, paragraph 1 (h). It hoped that the same article would expressly

(Miss Boum, Cameroon)

state that the tribunal could exercise its jurisdiction only over individuals who had been referred to it through legal channels. Article 45, paragraph 2 (b), rendered meaningless the principle of the force of res judicata.

8. The issue of whether the Security Council should be entitled to refer cases to the tribunal merited further study. If such a right were granted to the Council, its permanent members should be prohibited from using the veto when that right was being exercised, so as to prevent any selective referrals.

9. Mr. AL-BAHARNA (Bahrain) said that the draft statute for an international criminal tribunal (A/48/10, annex) had profound political and legal significance for individuals, States and the international community as a whole. The International Law Commission and the Sixth Committee, mandated to elaborate the statute, must therefore spare no effort.

10. The Commission was divided with regard to the nature of the relationship between the tribunal and the United Nations, as was demonstrated by the fact that the content of draft article 2 of the statute was presented in two versions in square brackets. His delegation believed that the tribunal should become a judicial organ of the United Nations, which need not necessarily entail amending the Charter; as had been done with the United Nations Conference on Trade and Development and the International Law Commission, the tribunal could be established by means of a resolution adopted by the General Assembly. To avoid disagreement, the tribunal could, if necessary, be considered as an instrument of the United Nations, rather than an actual organ. Nevertheless, the tribunal should be more closely linked with the United Nations than the specialized agencies: it had to be an integral part of the Organization.

11. His delegation was not satisfied with the definition of the status of the tribunal as contained in article 4, paragraph 1. That paragraph as well as article 3 needed to be rewritten to express clearly the international and permanent nature of the tribunal.

12. The procedure for electing judges, which under article 7, paragraphs 1 and 2, was open only to States parties, seemed too limited. Judges should be elected by the General Assembly and the Security Council, or by the Assembly alone, which would strengthen the tribunal's relationship with the United Nations. Moreover, the criteria of equitable geographical representation and representation of different forms of civilization and of the major legal systems should be added to those listed in article 7, paragraph 5, following the example of article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination.

13. The jurisdiction of the tribunal, which was the cornerstone of the draft statute, should be based on consensus, as expressed in Alternative A of article 23, which offered an "opting in" system and provided for the possibility of a general declaration similar to the optional clause contained in Article 36 of the Statute of the International Court of Justice. In addition, article 23 should precede article 22 because the tribunal's jurisdiction over the crimes listed under article 22 was subject to States' declarations of acceptance, as provided for under article 23.

(Mr. Al-Baharna, Bahrain)

14. It was surprising that torture was not one of the crimes listed in article 22; furthermore, it might well be asked whether that list reflected the list of crimes in the draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission on first reading in 1991. His delegation was not convinced by the distinction made in the commentary (para. 1) between treaties which defined crimes as international crimes and those which merely provided for the suppression of undesirable conduct constituting crimes under national law, for the purpose of conferring jurisdiction on the tribunal under articles 22 and 26. It would be better to combine articles 22 and 26 into a single article which would define the tribunal's jurisdiction rationae materiae.

15. With regard to charges of aggression, dealt with in article 27, a mechanism should be set up for the indictment of individuals who had committed acts of aggression in cases where the Security Council was blocked from acting because the veto had been used; otherwise there would be two categories of individuals, one of which, through the protection afforded by the veto, would be beyond the tribunal's jurisdiction.

16. The list of sources of applicable law, provided under article 28, should be enlarged to take account of "new" categories of sources, such as "considerations of humanity" invoked by the International Court of Justice in the Corfu Channel case and "decisions of international organizations". Furthermore, in article 28, paragraph (c), the phrase "as a subsidiary source" should be deleted.

17. Since the Security Council could be paralysed by a veto, it might be appropriate to consider granting the General Assembly or the Secretary-General the authority to bring complaints in accordance with draft article 29. As to article 38, the right to challenge the tribunal's jurisdiction should be granted to all States parties and not just those which had a direct interest in the matter, because the issue was of general interest to the international community of States. In cases where the tribunal's jurisdiction was challenged by the accused, the decision on that important question should not be taken by the Bureau but by a chamber established at the pre-trial stage.

18. In terms of whether, for the principle of legality (article 41) to apply, the State party must have fulfilled any obligation provided for in the treaty or required as a matter of internal law either to adopt implementing legislation or to define the crime as a matter of national law, his delegation considered that the treaty did not directly create any obligations for individuals and, consequently, would like the phrase between brackets in paragraph (a) of article 41 to be retained, so as to enable States that were required by their domestic law to adopt implementing legislation to become parties to the treaties concerned.

19. His delegation had reservations about article 45 concerning the force of res judicata, which gave the tribunal a freedom denied to other courts. He hoped that the text could be reworded, especially that of paragraph 2 (b).

20. The rules governing evidence (article 48) were far too complex to be addressed in the statute, not to mention the fact that they differed from country to country and it therefore would be difficult to find a common

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denominator. It was hard to see how it would be possible to formulate international rules on such matters as confessions, the presentation of evidence by electronic means and perjury.

21. With regard to proceedings on appeal (draft article 56), there should be a higher and a lower court, as there was in national systems, and different criteria should be laid down for the appointment of judges, depending on whether they belonged to the trial chamber or the appeals chamber. Any arbitrary action on the part of the bureau with regard to the composition of chambers would thus be avoided.

22. Lastly, his delegation hoped that the Working Group's report would be given more critical consideration than it had been at the forty-fifth session. There was also a need to rationalize the functions and responsibilities of the chamber, the tribunal and the bureau, along with any decisions they might take before and during the proceedings, in accordance with the articles relating to jurisdiction, particularly articles 22, 24 and 26. Article 48, relating to evidence, should be either deleted or incorporated in the tribunal's rules of procedure.

23. Mr. CISSE (Senegal) observed that the term "tribunal" had been preferred to that of "court" simply for historical reasons, by analogy with the Nürnberg Tribunal. But the comparison should stop there, since the jurisdiction that was to be established should be of a permanent nature, as an expression of the continuing need to prosecute and punish, at all times and in all places, crimes of particular gravity, such as war crimes or crimes against humanity; the force and credibility of a judicial institution depended on such permanence. That being so, it was not necessary for the tribunal to meet full time; it would be enough if it met when circumstances demanded it.

24. While the future jurisdiction would undoubtedly need help from the United Nations, whether administrative or financial, it was impossible to decide, as matters stood, that it should be an organ of the United Nations. It would therefore be better to adopt the second paragraph of article 2 of the draft statute, currently in square brackets, since it established the more flexible relationship between the United Nations and the tribunal. Moreover, since the Security Council had some jurisdiction in matters of aggression and, more generally, in the matter of any action liable to disturb international peace and security, and since such an action would also be the concern of the tribunal, it was inconceivable that the two bodies should function without reference to one another.

25. While the tribunal's jurisdiction ratione personae posed no particular problems, since it was to try individuals only, its jurisdiction ratione materiae raised far more complicated questions. According to current international law, offences could only be defined by treaty. Moreover, the consent of States was required for offences thus defined to be applied to their own nationals. At the current stage of the development of international society, all international criminal law was treaty-based, which was why there were evident differences in the International Law Commission between the realist tendency, which wanted to act on the basis of international society as it

(Mr. Cisse, Senegal)

actually was, and the tendency which wanted to mould the world according to what it should be. Thus there appeared in the draft statute both article 22, listing crimes defined by conventions, and article 26, covering other crimes not defined by treaties but existing none the less under general international law.

26. His delegation approved of the fact that article 26, paragraph 2 (b), of the draft statute extended the tribunal's jurisdiction ratione materiae to international drug trafficking. What made that a crime against humanity was the fact that it involved vast amounts of cross-border trafficking.

27. With regard to the question of the acceptance by States of the tribunal's jurisdiction, two tendencies could be observed in the Commission. According to one view its jurisdiction should be compulsory for States as a matter of international public policy and need not be subject to consent at all. According to the other view, States could not be bound without their consent. The Commission had not ruled out either position. Thus article 23 defined the cases where acceptance by States was required, while article 25 laid down those in which the tribunal's jurisdiction was compulsory for States and did not require their acceptance. Whether it was compulsory or not depended on whether the complaint was initiated by the Security Council. The Council became, in a sense, the guardian of international public policy.

28. While it was normal to reserve to States the right of referral to the tribunal, and to deny that right to individuals, there was no obvious reason why the door of the tribunal should be closed to international organizations, particularly those concerned with human rights.

29. His delegation welcomed the provisions allowing the complainant State the right to appeal against a decision by the prosecutor not to take action on a complaint for lack of a legal basis or because the complaint was not serious. The prosecutor was responsible not for trials, but for prosecution and in that connection it was also questionable to put him in charge of both prosecution and investigation.

30. By ruling out a judgement in absentia against an accused who, although lawfully summoned, did not appear, the Commission seemed to have given the accused an advantage, allowing him a right of veto, as it were. There was no need to adopt that approach, since a judgement in absentia would be annulled when the accused appeared and gave notice of opposition and it therefore did not constitute a definitive conviction.

31. He emphasized the need to devote all the attention that might be required to the question of judicial cooperation between States, including both States parties and States not parties to the statute.

32. With regard to the question of civil damages, his delegation regretted that the statute limited the tribunal's jurisdiction to criminal penalties without allowing it also, if the complaint so requested, to rule on civil damages. The matter should be examined in depth, since small States would have difficulty in meeting the costs of two proceedings, one for the criminal conviction and the other to obtain damages for injury.

(Mr. Cisse, Senegal)

33. Until an international criminal code was adopted, his delegation considered that article 53 of the draft statute was acceptable and did not constitute a precedent: many draft statutes for an international criminal court, drawn up both before and after the Second World War, had followed the same lines.

34. Ms. ARIFFIN (Malaysia), referring to the draft statute for an international criminal tribunal, welcomed the Working Group's proposal that it should be established as a permanent structure sitting only when required to consider cases submitted to it. That would ensure the cost-effectiveness of the institution without compromising its permanence, stability or independence, provided that it was able to meet the highest standard of justice and comply with international standards of due process and fairness.

35. On the question of the relationship of the tribunal to the United Nations, there was no specific provision in the United Nations Charter for the establishment of an international criminal tribunal, although there were provisions for the establishment of subsidiary organs. Those provisions appeared in Article 7, while Article 22 specifically empowered the General Assembly to establish such subsidiary organs as it deemed necessary for the performance of its functions and Article 29 gave the same power to the Security Council. It would therefore be legally possible to establish the tribunal as a subsidiary organ of the United Nations without having to amend the Charter. It would be advantageous for the tribunal to be associated with the United Nations to ensure universal acceptance and to enhance its authority and credibility. The Working Group had rightly posed the question as to whether a formal link with the United Nations could not as well be achieved through a treaty of cooperation along the lines of those between the United Nations and its specialized agencies.

36. With regard to the election of judges, she said that equitable geographical representation should be an important consideration. Her delegation endorsed draft article 7, paragraph 5, believing that a court which was representative of the various legal systems of the world would be more likely to attract wider acceptance by the international community. With regard to the term of office, 12 years might be too long; the length should be reviewed by the Commission.

37. With regard to the court's jurisdiction and the applicable law, her delegation agreed with the distinction made by the Working Group between the two strands of jurisdiction; however, it questioned whether the crimes listed in article 22 rigorously met the criteria set by the Working Group for the first strand of jurisdiction. In any event, Malaysia shared the Australian delegation's view that the list of crimes should not be exhaustive and that States parties to the statute should be able subsequently to include other crimes in it, including those defined by conventions which had not yet been drafted. However, article 21, which provided for the possibility of a review conference, went some way towards meeting that concern.

38. Her delegation endorsed the inclusion in the second strand of jurisdiction of the two categories of crimes listed in article 26. It shared the Working Group's view that crimes such as aggression, which was not defined by treaty and could not, therefore, be included in article 22, and genocide, in the case of

(Ms. Ariffin, Malaysia)

States not parties to the Genocide Convention, should not, for those reasons, be excluded from the court's jurisdiction.

39. Articles 23, 24 and 26 laid down too many conditions for acceptance of the court's jurisdiction. It should be borne in mind that, unlike the International Court of Justice, an international criminal court would have jurisdiction over individuals, not States. It would not be in the interest of States or of the international community as a whole to allow perpetrators of grave international crimes to go unpunished. The indictment of a national of a given State would in no way encroach on the sovereignty of that State and should not be perceived as doing so.

40. With regard to article 25, her delegation strongly supported the view expressed during the debate that the power conferred on the Security Council to refer cases to the court should be extended to the General Assembly. That would be in keeping with the proposals for the reform of the United Nations and, in particular, for the enhancement of the General Assembly's role as envisaged by the Charter.

41. With regard to the provisions of the draft statute designed to protect the rights of the accused, her delegation believed that the principle of legality (nullum crimen sine lege), as provided for in article 41, was fundamental and consistent with the relevant provision of the International Covenant on Civil and Political Rights. The brackets should be removed from the phrase "and its provisions had been made applicable in respect of the accused", which made it clear that a given treaty provision must have been made applicable to the accused in accordance with the constitutional provisions of the State party concerned.

42. With regard to article 44 (Rights of the accused), her delegation firmly supported the principle of the right of an accused person to be present at his trial. However, that right should not preclude trials in absentia, especially in cases where the absence of the accused was deliberate; otherwise, abuses might occur, which could paralyse the court. Accordingly, article 44, paragraph 1 (h), should be retained. However, her delegation proposed the inclusion in the statute of a provision allowing for the retrial of the accused, should he surrender to the court.

43. Her delegation welcomed the inclusion in the statute of the principle of non bis in idem (article 45). However, paragraph 2 (a) of that article, which allowed the court to try a person who had been convicted by another court where the act in question had been characterized as an ordinary crime, derogated from that fundamental principle. Accordingly, the Commission should review that paragraph.

44. Mr. CASTELLI (Argentina) expressed the view that the draft Code of Crimes against the Peace and Security of Mankind could be essential to the smooth functioning of the international criminal court, inasmuch as it was seen by some as an indispensable additional instrument which substantially clarified the court's jurisdiction ratione materiae.

(Mr. Castelli, Argentina)

45. However, if the international community's wish to establish such an international criminal court was to be realized, cooperation between States and between all other parties concerned must be increasingly strengthened. The court's legitimacy would depend on the nature of the statute to be adopted by the General Assembly.

46. His delegation endorsed the Working Group's proposal to establish a permanent institution which would, however, meet only to try specific cases; in its view, that formula demonstrated the cautious approach to the establishment of the court which it advocated.

47. The court should be closely linked to the United Nations so that it could benefit from the Organization's legitimacy. His delegation agreed that the link should take the form of a special relationship between the court and the Organization, as amending the Charter in order to make the court a judicial organ of the United Nations would be difficult.

48. His delegation deemed it unsatisfactory that the court would not have original jurisdiction, in other words, that its jurisdiction would not be based on the instrument establishing it, but would be derived, or subject to the will of States, which could accept or reject its jurisdiction.

49. With regard to the applicable law and, in particular, the application of the principle of nulla poena sine lege, the category of "crimes under general international law" was open to the same criticism as the treaties listed in article 22, namely, that it did not always define crimes sufficiently to enable that principle of general criminal law to be applied. Accordingly, Argentina called upon the Commission to expedite its work on the draft Code of Crimes against the Peace and Security of Mankind, for, if the provisions of the draft Code could be harmonized with the general selection criteria applied to the crimes listed in the current draft statute and with the comments of Member States, it would provide an excellent basis for the punishment of well-defined categories of crimes. Clearly, the Commission should review articles 22 to 26 in the light of the comments made during the current debate.

50. With regard to article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), his delegation preferred Alternative B, which most closely approximated what it regarded as the ideal solution, namely, that a State becoming a party to the statute would automatically be deemed to have accepted the court's jurisdiction over all crimes.

51. With regard to trials in absentia, his delegation, while mindful of the objections raised from the standpoint of the International Covenant on Civil and Political Rights, believed that the right to be present at one's trial could not be invoked in some cases, for example, where the person who had that right deliberately eluded justice. In case of doubt, trials in absentia could be authorized, provided that they were accompanied by sufficient guarantees and that a new trial could be held in the presence of the accused should he subsequently surrender to the court.

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52. The Security Council's power to refer cases to the court should probably be limited to matters involving its responsibility for the maintenance of international peace and security.

53. The requirement that, in order for an individual to be tried for aggression, the Security Council must have determined beforehand that an act of aggression had been committed might prove to be undesirable; in the first place, the Security Council was a political body, whereas the court must act on the basis of purely legal criteria and, secondly, instances in which the Security Council deemed it necessary and appropriate to make such a determination were very rare. That notwithstanding, the punishment of aggression, which was deemed to be an international crime par excellence would encounter tremendous obstacles.

54. Lastly, his delegation called upon the Commission to complete the draft statute at its next session, bearing in mind the need to harmonize its work on the topic with its work on the draft Code of Crimes against the Peace and Security of Mankind.

55. Mr. MONAGAS (Venezuela) said that the International Court of Justice should be supported by an international criminal court which would ensure an impartial trial for persons accused of international crimes where there was no possibility of having recourse to other criminal proceedings. For that reason, he welcomed the work carried out by the Commission on that important topic.

56. With regard to the draft statute of the court, his delegation preferred the solution proposed in article 2, whereby the court would be an organ of the United Nations with exclusive jurisdiction, on the model of the International Court of Justice. However, Venezuela agreed that the court should be established by means of an international instrument to be signed and ratified by the States concerned; the Commission should consider devoting an article to that question, which would stipulate the number of ratifications required for the entry into force of the instrument and the establishment of the court.

57. With regard to article 4, it was good that the tribunal, while a permanent institution, sat only when required to deal with a case submitted to it. As for the election of judges (article 7), it should take place according to the principle of equitable geographical distribution of the different legal systems in order to make the tribunal universal in nature.

58. The jurisdiction of the tribunal (article 22) should be exclusive and should not overlap with the jurisdiction of national courts, neither should the tribunal hear appeals against their decisions. The jurisdiction should cover the international crimes defined in the various conventions listed in the article. Furthermore, a way should be left open to include the code of crimes against the peace and security of mankind in the list. That could be done by inserting a provision to that effect into the statute.

59. Regarding article 23 on the acceptance by States of the jurisdiction of the tribunal, his delegation favoured Alternative A according to which a State did not automatically recognize the tribunal's jurisdiction just because it was a

(Mr. Monagas, Venezuela)

party to the statute, but would have to make an explicit declaration to that effect.

60. His delegation considered that trials must be fair and impartial and the rights of the accused respected, and for that reason it would prefer to delete from article 44 subparagraph (h), which dealt with judgement in absentia, since it went against the principle contained in article 14 of the International Covenant on Civil and Political Rights which proclaimed the right of any person facing criminal charges to be present at his or her trial.

61. His delegation supported the proposal of the Canadian delegation concerning article 51 that dissenting opinions should be included in writing in the judgement, in addition to the full and reasoned statement of the findings and conclusions of the court on the facts and points of law, because that would add to the transparency of the proceedings. It fully endorsed the wording of article 53 (Applicable penalties) on condition that the death penalty was excluded from it and that it should clearly state that the tribunal was not only competent to judge the accused person but also to pronounce judgement on the penalty to be imposed and the civil responsibility of a convicted person.

62. His delegation fully supported Part 5 of the draft statute concerning the appeal and review of the tribunal's judgements, since it considered that every accused person had the right to appeal against a decision made against him if he felt that it was tainted with error or that the penalty was disproportionate. The appeals chamber must be composed of judges other than those who had made the decision that was being reviewed.

63. Mr. DZUNDEV (former Yugoslav Republic of Macedonia) said that the events of recent years, in particular the violations of international humanitarian law committed in the territory of the former Yugoslavia, had proved to the international community the need to establish an ad hoc criminal tribunal through a Security Council resolution.

64. Although the draft statute under consideration was an important step in the development of international law, he shared the opinion of the United States delegation that great caution should be exercised in setting up new, untried mechanisms in the field of criminal justice. In that regard, since certain key issues had not yet been resolved, it would be to the benefit of all to learn from the experience of the ad hoc international tribunal for the prosecution of persons responsible for crimes committed in the territory of the former Yugoslavia in order to clear up some uncertainties and resolve some practical questions. The Commission should also in particular give careful and adequate consideration to the issue of extradition.

65. Finally, the delegation of the Republic of Macedonia was aware of the importance of the international criminal tribunal, and was convinced that the international community would strongly support its establishment.

66. Mr. ECONOMIDES (Greece), speaking on a point of order, protested vigorously, from a procedural point of view, against the use of the name Republic of Macedonia by the representative of the former Yugoslav Republic of Macedonia, as it was a blatant violation of both Security Council and General Assembly resolutions on the question, under which the Republic of Skopje had been provisionally admitted into the United Nations under the name of the former Yugoslav Republic of Macedonia, which should be used in the United Nations without any exception, limitation, reserve or nuance pending settlement of the dispute between Greece and the Republic of Skopje, which was precisely a dispute over the name of that Republic.

67. He also wished to protest on the grounds of substance against the fact that by speaking indiscriminately and generally of the Republic of Macedonia, which meant the whole region of Macedonia, the representative of the former Yugoslav Republic of Macedonia was also speaking, by the very nature of things, on behalf of Greek Macedonia, which was of course unacceptable to Greece and contrary to the most elementary principles of international law. By arbitrarily and groundlessly attempting to appropriate the name of the entire Macedonian region, the Republic of Skopje was actually continuing the Communist post-war policy of denying the sovereignty of Greece over its Macedonian territory.

68. Mr. DZUNDEV (former Yugoslav Republic of Macedonia), speaking in exercise of the right of reply, said that the statement made by the representative of Greece was most inopportune. According to the Security Council resolution, the Republic of Macedonia could use its constitutional name. The representative of Greece should consult the United Nations Office of Legal Affairs on the subject. Every country had the right to choose its own name, in the case in point "Republic of Macedonia". Moreover, the relevant resolution of the Security Council did not deal with the name of the country, but merely urged the parties to resolve their dispute in conformity with the Charter of the United Nations.

69. Lastly, it was a fact that the Macedonian Government had always acted in a constructive way in the affair and that all the differences which had brought it into opposition in Greece had been raised by Greece itself.

70. Mr. AYEWAH (Nigeria) recalled that his delegation had agreed that the Commission should draft the statute of an international criminal tribunal but that it would prefer the Commission to complete first of all the elaboration of the draft Code of Crimes against the Peace and Security of Mankind. Even if that draft raised sensitive legal and political questions, that should not prevent the Commission from settling in an acceptable way all the issues raised by the Special Rapporteur in paragraph 37 of the report under consideration. For the time being, the Commission deserved nothing but praise, above all for the way in which it had made every effort to resolve central questions such as applicable law, the jurisdiction of the court and the rights of the accused, issues which deserved further study.

71. As the Commission had said, the law applicable by the future tribunal should in a general way derive from international conventions and agreements, and in exceptional cases from customary law and the general principles of law. The rules of procedure and of evidence, and the national legislation to be used in determining sentences, were part of case law and would therefore also be applicable. From that point of view paragraph (b) of article 21, which would

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extend the tribunal's jurisdiction, should be merged with the provision on review. It should be made a separate article in Part 2 of the draft statute which dealt with applicable law. Similarly, a separate subparagraph should be included in article 28 on the general principles of international law. In that new paragraph and in paragraph (b) of the same article there should be a reference to article 26 so that the reader could distinguish clearly between the concepts in question.

72. Restricting the jurisdiction of the court to individuals was acceptable to his delegation. The most practical solution would be for the court's jurisdiction ratione materiae to be derived from the Code of Crimes, but since the Code had not been completed, the establishment of jurisdiction through special agreements between States parties was a prudent alternative. Paragraphs (a) to (h) or article 22 contained a list of crimes, defined by treaties that might come under the jurisdiction of the Court. The distinction made was not unassailable, yet the list provided a useful survey of treaties that would eventually lay a foundation for the jurisdiction of the court. In article 23, the International Law Commission had proposed several alternatives, the rationale of which was readily understandable. Efforts should be made, however, to avoid establishing a court with no law to enforce - a situation that might be created by Alternative A. States parties might opt for only one or more of the treaties. But if a State became a party to the statute of the court, all the crimes listed in article 22 would come under the court's jurisdiction. That seemed to be a better solution.

73. Article 24, governing conflicts of interest between States competent to try a suspect, provided a good solution. The power given to the Security Council to refer matters to the court ought to be extended to the General Assembly. Moreover, a limitation needed to be imposed on the possibility of using those provisions for situations other than aggression. Articles 25 and 27 should be merged, since they both related to the Security Council. Article 26, relating to special acceptance of jurisdiction in cases not covered by article 22, might overload the work of the court, all the more so in that there existed in international law "exceptionally serious" crimes, a concept which in any case needed to be defined.

74. Any criminal system must ensure that accused persons received a fair trial. In an age when publicity and public opinion could play a major role in determining the perception of events, the need to adhere to the highest standards of protection of the rights of accused persons was crucial. His delegation therefore fully supported the proposals made by the Commission in articles 40 to 45, which were intended to ensure respect for those rights. As required by the International Covenant on Civil and Political Rights, an accused person must not under any circumstances be tried in absentia. Therefore, paragraph (h) of article 44 should be deleted.

75. His delegation did not feel that the elaboration of the draft statute must necessarily be completed in 1994. The Commission should bear in mind that the complexity and sensitivity of the subject demanded a detailed examination.

76. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the

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establishment, at the forty-fourth session of the International Law Commission, of a working group to consider the general issues relating to the scope of the topic and the approach to be taken in studying it.

77. Regarding State responsibility, the Commission had raised the question whether the future convention should contain a provision on the settlement of disputes arising out of its application. Nigeria's answer was affirmative. It felt, however, that the question of countermeasures required special attention and priority, for the simple reason that countermeasures constituted a derogation from international law. In paragraph 251 of document A/48/10, the Commission examined two alternatives. The second was more practical, since subjecting a State to compulsory settlement of disputes was not in keeping with the current level of development of international society. It would be appropriate, therefore, to adopt a provision whereby, if any State intended to resort to countermeasures, it must first warn the State concerned, requesting that some settlement procedure be resorted to without delay. But if the dispute was not settled in that way a compulsory third-party settlement procedure should be utilized to impose additional restrictive legal control on a State that resorted to unilateral measures. His delegation was not convinced that a compulsory third-party settlement procedure could be used successfully in a future convention, yet it was attractive because it would provide an opportunity to develop international law and would protect weak States from abuses on the part of powerful ones.

78. After noting the progress made by the Commission on the topic of the law of the non-navigational uses of international watercourses, he expressed the hope that flexibility would be exercised so that quality would not be sacrificed simply for the sake of meeting time-limits. A publication prepared by members of the Commission as a contribution to the United Nations Decade of International Law would be a welcome initiative.

79. Mr. REKSODIPUTRO (Indonesia), commenting on the various issues involved in the elaboration of a statute for an international criminal tribunal, said that it should operate on an ad hoc basis. The applicable law should be derived from international conventions and agreements, and only the crimes listed in those instruments could be tried. While custom and general principles of international law constituted sources of law, they were not specific enough. The court should consider national law in determining sentences. Its jurisdiction should be concurrent with that of States, which could either try a case or refer it to the court. The court's jurisdiction should apply solely to individuals. As for its jurisdiction ratione materiae, it should cover crimes against humanity, including apartheid, aggression, serious crimes connected with international drug traffic, and genocide. Regarding organization, the members of the court should be elected by the General Assembly, for that would contribute to their independence and impartiality while strengthening the ties between the United Nations and the court.

80. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, Indonesia subscribed to the provisions of paragraphs 134 to 137 of document A/48/10 and agreed that developing countries did not have adequate resources to meet the onerous obligations imposed by the draft articles. It was gratifying to note the

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Special Rapporteur's suggestions that a specific provision should be formulated to deal with the situation in those countries and that account should be taken of the principles laid down in the Rio Declaration on Environment and Development.

81. On the subject of State responsibility, it should be borne in mind that the Manila Declaration on the Peaceful Settlement of International Disputes might be beneficial for the dispute settlement regime envisaged for the future convention. As for countermeasures, their scope must be severely restricted, for they might lead to abuse by powerful States; they should be aimed at restitution, not punishment. Third-party dispute settlement procedures in the field of State responsibility were a sine qua non of international law and were indispensable for the protection of militarily weaker States.

82. The arrangements being made by the Commission for a publication containing a number of studies prepared by its members were appreciated. The publication would be an invaluable contribution to the Decade of International Law. His delegation was also pleased to note that the Office of Legal Affairs placed special emphasis on the teaching, study and dissemination of international law. The Commission's cooperation with other juridical bodies, in particular the Asian-African Legal Consultative Committee, and the continued success of the International Law Seminar, an institution of great value that deserved the full support of the States Members, were steps in that direction.

83. Mr. CAFLISCH (Observer for Switzerland) said that the Commission's success in presenting a high-quality draft statute for an international criminal tribunal in a very short period of time was to some extent due to the excellent report of the Secretary-General on the establishment of an ad hoc international tribunal for crimes committed in the former Yugoslavia (S/25704, issued on 3 May 1993). However, the Statute of the International Tribunal had become applicable immediately to all Member States under Article 25 of the Charter, while the international criminal tribunal would have to be established by way of a treaty. It would hardly be surprising therefore that countries whose nationals had little for which they could be reproached should be readier to commit themselves than other countries, which would considerably detract from the usefulness of the new instrument. Nevertheless, it was hard to see how the international community could proceed otherwise.

84. The future tribunal would therefore be a jurisdiction at the service of States parties to the treaty establishing the tribunal. The situation was quite different from that of the International Court of Justice, and the tribunal could not be regarded as one of the "judicial organs" of the United Nations, as the bracketed text in draft article 2 proposed. The Commission should adopt another approach, that of an independent tribunal which would nevertheless be linked to the United Nations by a treaty of cooperation.

85. In terms of organization, the three organs envisaged, including the procuracy, seemed quite essential. The Swiss Government, however, found the number of 18 judges excessive and preferred to follow the example given in article 12 of the Statute of the International Tribunal for the Former Yugoslavia, which provided for 11 judges, except where that number was increased in accordance with article 21 of the Statute. It also found excessive the

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duration of the non-renewable terms of the judges, which should be reduced to nine years.

86. The provisions of the draft which defined those crimes over which the court was to have jurisdiction drew a distinction between offences defined as crimes giving rise to individual responsibility by the treaties which provided for their suppression (article 22) and other crimes giving rise to individual responsibility that were punishable under customary or conventional international law (article 26). The court could only have jurisdiction, however, where the State concerned accepted such jurisdiction. Article 23 offered three alternatives, of which the Swiss Government preferred the second: the presumed acceptance of jurisdiction over crimes punishable under the conventions listed in article 22, where the State in question was a party to the convention in question (Alternative B). For those crimes listed in article 26, which were less clearly identified as crimes under general international law or conventional law, the solution of special consent in the form of a unilateral declaration seemed to be an appropriate one.

87. The possibility proposed in article 25 for the Security Council to refer cases to the court would be open to criticism if such jurisdiction were automatic, which was not the case, since the State concerned must have accepted the court's jurisdiction in conformity with articles 23 or 26. On the other hand, he questioned the proposal that the prosecutor should not be authorized to initiate investigations ex officio or on the basis of information obtained, even if it subsequently turned out that the court had no jurisdiction. That solution was unlike the one adopted for the International Tribunal for the Former Yugoslavia (article 18), which seemed preferable.

88. The commentary to draft article 31 gave the court almost unlimited latitude in the matter of detention. There was a need at least to establish a mechanism that would permit the detainee to request that he should be released on bail while awaiting trial. In paragraph 6 (b) of the commentary to article 38, States were invited to decide whether the accused should have the possibility of challenging the jurisdiction of the court. Since the international criminal responsibility of individuals was involved, the Swiss Government believed that that question should be answered in the affirmative.

89. The range of penalties provided for in article 53 was extremely broad (fines "of any amount"). The rules were too vague to meet fully the requirements of the principle nulla poena sine lege. They would be more specific if article 53 provided that the chamber should, and not could, have regard to the penalties provided for by national law.

90. Article 44, paragraph 1 (h), excluded the possibility of trials in absentia, as in the case of the International Tribunal for the Former Yugoslavia. The real question was whether the authorization of trials in absentia entailed a risk of transforming the court into a "paper tiger". The risk was very real, and the Swiss Government was of the view that subparagraph (h) should not be retained in its current form.

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91. Part 5 of the draft, entitled "Appeal and review", provided for appeals by the convicted individual on the grounds of material error of law, error of fact, or a manifest disproportion between the crime and the sentence (article 55). That provision should be adopted. However, there remained the problem of the international human rights instruments which provided for recourse against arbitrary arrest under national law. The question to be asked was whether the introduction of domestic recourse against arrests made for the purpose of bringing the accused person before the court would be desirable. The grounds for appeal should, however, be limited and should be largely formal in character, with a very short period for the lodging of such appeals.

92. Part 6 of the draft concerned international cooperation and imposed on the States parties to the future statute significant obligations in a number of key provisions. Questions remained, however, about the surrender of nationals, which - it would appear - could be required of States. The extradition of nationals was prohibited in some countries, which would therefore have difficulty in accepting the draft. Switzerland wondered whether it would be preferable to apply the principle aut dedere aut judicare in respect of nationals.

93. His comments, which were partly prompted by the recent experience with the International Tribunal for the Former Yugoslavia, should not detract attention from the fact that the draft had been well prepared and was useful and very timely. The challenge now was to avoid losing momentum and to take advantage of the lessons learnt from the case of Yugoslavia. The ad hoc tribunal for the former Yugoslavia, which was confined to dealing with a serious but isolated conflict, should not serve as a pretext for diminished interest in the establishment of a permanent international criminal jurisdiction. The overall situation was favourable to such a project, and public opinion would not countenance its abandonment.

94. Mrs. HUYNH (Observer for the International Committee of the Red Cross) said that it was regrettable that the system of universal criminal jurisdiction established by the 1949 Geneva Conventions had not always been effectively implemented. The decision to establish an international tribunal for the prosecution of persons responsible for crimes committed in the territory of the former Yugoslavia helped to strengthen the existing system and was a reflection of the political will of States to punish war crimes. ICRC welcomed that development, since, in its view, the tribunal represented a first step towards the establishment of a permanent international criminal jurisdiction.

95. ICRC was pleased with the significant progress made by the Commission in its work on a statute for an international criminal tribunal. It took special interest in draft article 22, which was to be read in conjunction with article 22 of the draft Code of Crimes against the Peace and Security of Mankind. The draft Code developed the concept of exceptionally serious war crimes, but not all the grave breaches listed in instruments relating to international humanitarian law were covered by the Code. ICRC feared that the scope of existing humanitarian law might be limited by such selectivity. On the other hand, article 22 of the draft statute for an international criminal tribunal listed in subparagraph (b) grave breaches of the 1949 Geneva

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Conventions and Protocol I additional thereto. Unlike the draft Code, the draft statute made no distinction between acts to be regarded as exceptionally serious war crimes and grave breaches covered by instruments relating to international humanitarian law.

96. ICRC sincerely hoped that work on the elaboration of the draft Code and the draft statute could be coordinated in order to punish more effectively crimes committed against the many victims of conflicts. While it was aware of the difficulties to be resolved in order to achieve that objective, ICRC believed that the notion of war crimes should be extended to cover crimes committed in non-international armed conflicts. In that regard, it was encouraging to note that the participants in the International Conference for the Protection of War Victims had adopted that approach in reaffirming in their final declaration their intention to ensure that war crimes were duly prosecuted and did not go unpunished.

97. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that they basically agreed with the draft articles in their current form. In particular, they subscribed to the distinction between international crimes and international delicts.

98. Concerning dispute settlement, the Nordic countries favoured a scheme which would, in the last instance, permit the final and binding settlement of a dispute to be decided by an independent third party, thereby pre-empting the unilateral adoption by a party of any countermeasures until it was decided whether a wrongful act had been committed and, if so, the form of reparation to be provided. The delays inherent in such a compulsory procedure would be far less prejudicial than a violation of the law by way of countermeasures, although some regarded that procedure as an unattainable ideal. In the view of the Nordic countries, such pessimism was unwarranted; the Security Council could be empowered to intervene in cases of non-compliance with the procedures in question. It should not be forgotten that the question of State responsibility had repercussions for the topics of the draft Code of Crimes against the Peace and Security of Mankind and international liability for injurious consequences arising out of acts not prohibited by international law.

99. The Nordic countries believed that draft article 6 was useful and well drafted; it protected the interests of both the injured State and the international community in the reliance on the rule of law. They agreed with the International Law Commission that cessation of wrongful conduct should be dealt with separately from the different forms of reparation. That said, cessation was applicable not only in isolation but also in conjunction with one or more forms of reparation, particularly restitution in kind.

100. Concerning article 6 bis, the Nordic countries agreed with the Commission that the negligence or the wilful act or omission of the injured State was a general factor to be taken into account in determining reparation. They also supported paragraph 3 of the draft article, which restated a well-known and universally accepted principle applicable to treaty law.

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101. Draft article 7 dealt with restitution in kind, which was the first method of reparation. However, the most suitable remedy could only be determined in each instance and there was no contradiction in recognizing, on the one hand, that monetary compensation was the more frequent form of reparation and, on the other hand, that restitution in kind was the very first remedy to be sought with a view to re-establishing the original situation. The Nordic countries had no difficulty with the exceptions contained in subparagraphs (a), (b) and (c). However, the last exception contained in subparagraph (d), dealing with situations that would seriously jeopardize the political independence or economic stability of the State which had committed the internationally wrongful act, appeared to introduce more problems than it solved. The terms "political independence" and "economic stability" were of a political rather than legal nature. The exception provided for under subparagraph (c) (disproportionality of the burden imposed by restitution in kind) could also be made to cover the last exception proposed with a view to leaving the text of the article as short and legally distinct as possible.

102. Paragraph 1 of draft article 8 on compensation appeared to be acceptable as currently drafted. The Nordic countries agreed with the Commission that, in view of the diversity of possible situations where damage could be caused by a wrongful act, it served no useful purpose to insert a qualifying adjective in the requirement relating to a causal link. Such qualifying criteria could be applied only on the basis of the circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators played a decisive role in judging the degree to which the injury was indemnifiable. That was especially true whenever the causal chain between the unlawful act and the injury was particularly long and linked to other factors.

103. Paragraph 2 of draft article 8 provided that compensation could include interest. Given the trend in international practice and doctrine, the Nordic countries believed that the inclusion of interest should be stated more clearly. The words "may include" should therefore be replaced by the word "includes". However, the words "where appropriate", which restricted compensation for loss of profits, were acceptable in that that concept was less widely accepted in the literature and in practice. The rather broad terms used in the drafting of the article - an approach with which the Nordic countries agreed - again highlighted the need to introduce into the articles on State responsibility effective provisions on compulsory third-party dispute settlement procedures.

104. Although international jurisprudence and diplomatic practice supported the form of reparation provided for in draft article 10 (satisfaction), it should be stressed that it was rather an exceptional remedy. The need to provide some specific remedy for the moral, political and juridical wrong suffered by the offended State should not, however, be overlooked. Such a remedy could have a preventive as well as an afflictive function. The Nordic countries agreed with the drafting of paragraph 2 of draft article 10 concerning the different forms of satisfaction, which provided only a non-exhaustive list. Recognition by an international tribunal of the unlawfulness of the offending State's conduct could perhaps be added. The mere fact of winning a case, or, in other words, obtaining an authoritative international ruling that one is right, frequently offered full satisfaction to the individual applicant or applicant State.

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Subparagraph (c) introduced a punitive element into the otherwise civil forms of reparation. The Nordic countries wondered, however, whether that concrete element of criminal law ought to be considered further in relation to provisions concerning the legal consequences of international crimes of States. The type of satisfaction dealt with under subparagraph (d) was an entirely separate question which had nothing to do with the issue of penalizing the State as such. The third and last paragraph of the draft article set a most reasonable and appropriate limit on the claims which could be made by the offending State, thereby safeguarding the dignity of the wrongdoing State.

105. Draft article 10 bis concerning assurances and guarantees of non-repetition indicated neither the kind of guarantees that could be requested, nor how claims could be presented. The choice of the measures most likely to prevent repetition remained with the wrongdoing State. The draft article correctly limited itself to recognizing that the wrongdoing State was under an obligation to provide guarantees if the risk of repetition was real and the injury suffered serious.

106. The Nordic countries were satisfied with the substantial progress made by the Commission on the topic and hoped that it would complete the first reading of all draft articles on State responsibility by 1996.

107. Mr. ECONOMIDES (Greece), speaking in exercise of the right of reply, said that compliance with Security Council resolutions was important. In the case of the former Yugoslav Republic of Macedonia, there was a dispute that had not been settled yet, which precluded any pronouncements on the matter. The Office of Legal Affairs was not qualified to settle the dispute or to interpret, let alone amend, the relevant Security Council resolution. Its opinions could in no way be binding on the Greek Government. The principle of neutrality should be upheld, and the scales should not be weighted in favour of one party to the detriment of the other. He failed to understand why there should be an international dispute concerning the name of a Member State of the United Nations. In that regard, it might be asked why the Republic of Skopje wished to choose a name designating a region far more extensive than its own territory and encompassing areas that belonged to neighbouring States, including Greece.

108. Mr. DZUNDEV (former Yugoslav Republic of Macedonia) regretted that the representative of Greece should attach such little importance to the opinions of the Office of Legal Affairs and affirmed that his Government harboured no expansionist aims.

The meeting rose at 6.30 p.m.